Supreme Court, U.S.
F I L E D
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No. 92-1568

In The

Supreme Court of the United States

October Term, 1992

ERMA L. ABAD,

Petitioner,

v.

KRAFT, INC. and CHARLES H. DIAL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DONALD M. FAIN
BRUCE A. MAXWELL
Counsel for Respondents
FAIN, MAJOR & WILEY, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Respondents do not agree with Petitioner's questions presented for review. Instead, Respondents show, if any such review is granted, which they contend it should not, the following is the only question presented for review before this Honorable Court:

Whether the Supreme Court of the State of Georgia erred in finding the Court of Appeals of the State of Georgia's decision operated to deny Respondents' due process and equal protection of law?

LIST OF ALL PARTIES

Petitioner:

Erma L. Abad

Represented by:

Arthur C. Nilsen
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033

Respondents:

Kraft, Inc.[1]

Represented by:

Donald M. Fain
Bruce A. Maxwell
Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

Charles H. Dial

Represented by:

Donald M. Fain
Bruce A. Maxwell
Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

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[1] Subsequent to the filing of the within action, Kraft, Inc. changed its corporate name to Kraft General Foods, Inc. Petitioner failed to amend her Complaint to cure this misnomer.

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- Supreme Court of Georgia decision dated 06/23/92 ..... C1
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OFFICIAL REPORT OF CASE

State Court of Fulton County, State of Georgia, Civil Action File No.: 134012, *Erma L. Abad, et al. v. Kraft, Inc. and Charles H. Dial* (1990) ..... Appendix Page A1

The Court of Appeals of the State of Georgia, Case No.: A91A1084, *Abad v. Kraft, Inc.*, 201 Ga. App. 523, 411 S.E.2d 500 (1991) ..... Appendix Page B1

The Supreme Court of the State of Georgia, Case No.: S92G0189, *Kraft, Inc. v. Abad*, 262 Ga. 336, 417 S.E.2d 317 (1992) ..... Appendix Page C1

The Supreme Court of the State of Georgia, Case No.: S92G0189, *Kraft, Inc., et al. v. Abad*, ORDER dated June 23, 1992 ..... Appendix Page D1

The Court of Appeals of the State of Georgia, Case No.: A91A1084, *Abad v. Kraft, Inc.*, ___ Ga. App. ___, 426 S.E.2d 270 (1992) ..... Appendix Page E1

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STATEMENT OF THE CASE

Respondents do not agree with the Petitioner's Statement of the Case as cast. This matter does arise out of an automobile incident which occurred on May 27, 1985. Suit was filed on July 11, 1986 with ensuing discovery. The scenario of events outlined in the Petitioner's Statement of the Case concerning the trial calendar, however, is not entirely correct.

At the trial court level, this case involved disputed liability and disputed damages. Initially, the case appeared on a July 16, 1990 two-week trial calendar. The case was not reached on that calendar. The case was then placed on a September 17, 1990 two-week trial calendar at which time the case was in position number 11 on the initially published calendar. Again, the case was not reached for trial and was continued to a two-week trial calendar beginning November 5, 1990, which provided as follows:

> The following cases are on a two-week calendar beginning on November 5, 1990. Since all cases were continued for the September calendar, there will be no need to call to report the expected length of trial. If you have a case that settles, please call Glenda Burton, Calendar Clerk, at 730-5177 by Friday, October 26, 1990.
>
> There will be a revised calendar published in the Fulton County Daily Report on Tuesday, October 30, 1990, which will delete any case which may have settled. The first case on the revised calendar will report ready for trial on Monday, November 5, 1990, at 10:00 a.m. *All remaining cases will be on a one-hour notice.* The

> cases may not necessarily be tried in order in which they appear on a calendar.

(Original emphasis).

At the time the revised trial calendar was published on Tuesday, October 30, 1990, the present case was in position number five (5) on the list of cases. (R. 26).[2]

Contrary to the record, Petitioner maintains before this Honorable Court that a 36-hour notice in connection with the published trial calendar had been granted. Instead, the record shows that the trial court did not grant Petitioner a 36-hour notice and during the week before the case was called for trial, the trial court expressly denied Appellee's request for advance notice beyond that provided for in the published calendar. Notwithstanding this knowledge, Petitioner, Erma Abad, failed to come from New York, her resident state, to Atlanta, Georgia, so that she could be available for the trial of her case.

On the morning of November 6, 1990, the Judge's calendar clerk, Glenda Burton, telephoned counsel for Petitioner and counsel for Respondents informing them that the case would be reached for trial at 1:30 p.m. that same day.[3] Ms. Burton later telephoned Petitioner's counsel's office again informing office personnel that the case

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[2] All record citations are herein represented by the symbol R. to be followed by the corresponding Georgia record page number.

[3] After being instructed to report, counsel for Respondents telephoned the office of Petitioner's counsel later that same morning to discuss the trial that was scheduled to begin at 1:30 p.m. At that time, Respondents' counsel was told counsel for Petitioner "had stepped away from his desk."

would be reached at 1:30 p.m., at which time she was told that counsel for Petitioner was away from his desk. Ms. Burton then left a message on Petitioner's lawyer's voice mail informing him that the case would be tried at 1:30 p.m. (R. 34-37).

Pursuant to the published calendar and the Judge's calendar clerk's instructions, Respondents and their counsel arrived in Court to try the case at 1:30 p.m. on November 6, 1990. (R. 34). Respondents' counsel along with the trial judge, waited some period of time for the Petitioner and her lawyer to appear in court. (R. 34). The Judge's calendar clerk, Glenda Burton, repeated her efforts to telephone the Petitioner's lawyer to inform him that the judge and opposing counsel were waiting. (R. 35-37).

At the very least, counsel for Petitioner and his office personnel were notified that the matter was being reached for trial. (R. 37). Notwithstanding telephone notice on or before 12:20 p.m. that the case was being called for trial, Petitioner's counsel did not appear at the courthouse. Petitioner, Erma Abad, also failed to appear for the call of her case. After waiting some period of time for Petitioner and her lawyer to arrive, the trial court proceeded with a trial on the merits. (R. 34). The trial court heard evidence supporting Respondents' liability defense and based upon that evidence, entered a judgment in favor of Respondents. (R. 34).

Petitioner incorrectly argued to the Court of Appeals for the State of Georgia that she was entitled to a thirty-six (36) hour notice in connection with the published trial calendar (again, contrary to the express terms of the trial

calendar). (R. 37). No such agreement to provide thirty-six (36) hour notice was granted by the trial court. Petitioner further argued to the Court of Appeals that the trial court at most had the power to dismiss the case without prejudice, a non-sanction. The Court of Appeals reversed the judgment in favor of the Respondents essentially finding that the trial court had no discretion to control its docket and could only dismiss the case without prejudice. (See Court of Appeals decision dated September 3, 1991, Appendix pp. B1 thru B3).

In response to the decision of the Court of Appeals, Respondents filed a Motion for Rehearing on September 16, 1991. The Motion for Rehearing was denied. Respondents then filed a Notice of Intention to Apply for a Writ of Certiorari with the Georgia Supreme Court.

A Petition for Certiorari was filed before the Georgia Supreme Court on November 1, 1991. Initially, the Georgia Supreme Court denied the Respondents' Petition for Certiorari. Respondents then filed a timely Motion for Reconsideration on December 9, 1991. In response to the Motion for Reconsideration, the Georgia Supreme Court vacated its previous denial and granted the Writ of Certiorari in this case on December 20, 1991. The Georgia Supreme Court's Order stated that the Court was particularly concerned with whether the opinion of the Court of Appeals operated to deny Kraft, Inc. and Charles H. Dial due process and equal protection of law. It should be noted that the Court of Appeals did not address Petitioners' jury demand issue. Likewise, the Georgia Supreme Court did not address the jury demand issue.

It is entirely true that Respondent's Petition For Certiorari filed with the Georgia Supreme Court argued the Court of Appeals' decision presented an issue of great concern, gravity and importance to the public. The Supreme Court of Georgia resolved this important issue by reversing the Court of Appeals and re-instating the judgment in favor of the Respondents. *On June 23, 1992,* the Georgia Supreme Court issued its opinion reversing the Court of Appeals, emphasizing that neither O.C.G.A. § 9-11-41(b) (concerning lack of prosecution) or Superior Court Rule 14 (concerning failure to respond to a calendar call), exhausts the options available to the trial court under its authority to control its own docket and regulate the business of the court. (Appendix p. C2) The Georgia Supreme Court further emphasized that "it goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the Court may go forward with the trial of the case as was done here." (See Supreme Court of Georgia opinion decided June 23, 1992, Appendix pp. C1 thru C3.) On June 23, 1992, the Supreme Court of Georgia remanded the case to the Court of Appeals noting that its decision was reversed and "that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in this case". (Appendix p. D1.)

On July 2, 1992, the Petitioner filed a Motion for Reconsideration with the Supreme Court of Georgia. The Petitioner's Motion for Reconsideration was denied on July 16, 1992.

Later, on December 4, 1992, the Court of Appeals, per the Georgia Supreme Court's prior instructions, published a decision vacating its previously issued opinion.

(*See* Court of Appeals' decision dated *December 4, 1992*, emphasis supplied, Appendix pp. E1 thru E2.) The Court of Appeals went on to note that the authority to also strike the demand for a jury-trial of Appellant (Erma Abad) was implicit in the trial court's authority to enter judgment in favor of the Appellee/Defendant upon Appellant's/Plaintiff's failure to appear at trial. (*Id.*) The December 4, 1992 decision of the Court of Appeals contained notice which instructed that Motions for Reconsideration must be received in the clerk's office within ten (10) days of the date of the decision. (Appendix p. E1.)

No such Motion for Reconsideration was filed by the Petitioner. The filing of a Motion for Reconsideration is a requirement under Georgia law before one may seek further review by the Supreme Court of Georgia, the state court of last resort. Further, contrary to the Petitioner's argument, no such December 4, 1992 decision of the Supreme Court of Georgia exists in this matter. The decision erroneously referred to by the Petitioner in her brief is that of the Court of Appeals of Georgia which is not a state court of last resort.

SUMMARY OF ARGUMENT

The Petitioner has failed to exhaust her state court remedies. The Petitioner erroneously refers to a December 4, 1992 decision by the Georgia Supreme Court denying reconsideration from a Court of Appeals decision. No such December 4, 1992 decision of the Georgia Supreme Court exists. Furthermore, the Petitioner did not file a motion for reconsideration with the Georgia Court of

Appeals within ten (10) days after the issuance of its December 4, 1992 opinion, a pre-requisite to petitioning for certiorari with the George Supreme Court. Further, the Petitioner has failed to file a second Petition for Certiorari with the Georgia Supreme Court following the December 4, 1992 decision of the Court of Appeals. Therefore, the Petitioner has not been denied Discretionary review by the state court of last resort as required by United States Supreme Court Rule 13.1.

The Petitioner has failed to file a timely Petition for a Writ of Certiorari with this Honorable Court. The decision from which the Petitioner is seeking further appellate review is that of the Georgia Supreme Court which was issued on June 23, 1992. Plainly, the Petitioner has also failed to seek a Writ of Certiorari from that decision within the ninety (90) days provided for by Supreme Court Rule 13.1.

ARGUMENT AND CITATION OF AUTHORITY IN OPPOSITION TO ALLOWANCE OF WRIT

I. THE PETITIONER HAS FAILED TO EXHAUST HER STATE COURT REMEDIES.

The Petitioner continually refers to a December 4, 1992 decision by the Supreme Court of Georgia. No such decision exists. This would account for the failure of Petitioner to attach a copy of any such decision to her Petition. The only December 4, 1992 decision was issued by the Court of Appeals of Georgia which is not a state court of last resort as required by United States Supreme Court Rule 13.1. Petitioner has also failed to exhaust her

state court appellate remedies by filing a Motion for Reconsideration within ten (10) days after the December 4, 1992 decision of the Court of Appeals. The filing of such a motion for reconsideration is a pre-requisite to seeking further Appellate review by the Supreme Court of Georgia. (*See* Georgia Court of Appeals Rules 4 and 48.)

Petitioner incorrectly states to this Honorable Court the following:

> On December 4, 1992, the Georgia Supreme Court denied the Petitioner's Motion for Reconsideration through and to the Court of Appeals of Georgia and affirmed its decision of June 23, 1992 and thereafter transmitted to the trial court the remittitur. *See* Appendix p. S).

The Petitioner erroneously refers to Page S of her Appendix in support of this statement. Page S of the Petitioner's Appendix is simply the beginning of the December 4, 1992 decision of the Court of Appeals of Georgia and from which, the Plaintiff failed to seek further review.

The Petitioner is incorrectly seeking review of a judgment of a lower state court which has not been denied discretionary review by the state court of last resort. Petitioner has failed to exhaust her Appellate remedies by petitioning for Certiorari a second time with the Supreme Court of Georgia following the issuance of the December 4, 1992 decision of the Court of Appeals. The Petitioner failed to file a Motion for Reconsideration within ten (10) days after issuance of the Court of Appeals' December 4, 1992 opinion, a pre-requisite to seeking Certiorari before the Supreme Court of Georgia. (*See* Rule 48 of the Court

of Appeals of the State of Georgia.) Therefore, the Petitioner is seeking a Writ of Certiorari from a lower state court which has not been denied discretionary review by the state court of last resort as required by United States Supreme Court Rule 13.1. Again, no such order by the state court of last resort exists.

II. THE WITHIN PETITION FOR A WRIT OF CERTIORARI HAS NOT BEEN TIMELY FILED.

The Petitioner has failed to timely file a Petition for a Writ of Certiorari before this Honorable Court. Supreme Court Rule 13.1 provides as follows:

> A Petition for a Writ of Certiorari to review a judgment in any case, civil or criminal, *entered by a state court of last resort*, a United States Court of Appeals, or the United States Court of Military Appeals, shall be deemed in time when it is filed with the clerk of this Court *within ninety (90) days after the entry of the Judgment*. A Petition for a Writ of Certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the clerk *within ninety (90) days after the entry of the order denying discretionary review.*

Sup. Ct. R. 13.1 (Emphasis supplied). Further, this Honorable Court's rules provide "the Clerk will refuse to receive any Petition for a Writ of Certiorari which is jurisdictionally out of time". Sup. Ct. R. 13.3. Also, this Court's rules provide "the time for filing a Petition for a Writ of Certiorari runs from the date the judgment or decree sought to be reviewed is rendered, not from the

date of issuance of the mandate (or its equivalent under local practice)." Sup. Ct. R. 13.4.

The Petitioner has failed to timely file her Petition for a Writ of Certiorari. The judgment from which the Petitioner seeks further review was issued by the Supreme Court of Georgia on June 23, 1992. In excess of eight (8) months has passed since the Petitioner filed for a Writ of Certiorari before this Honorable Court and the date on which the Supreme Court of Georgia's decision was rendered. The filing of the within Petition has plainly occurred in excess of the ninety (90) days required by United States Supreme Court Rule 13.1.

CONCLUSION

The Petitioner has failed to exhaust her state court remedies. The Petitioner repeatedly refers to a Supreme Court of Georgia decision dated December 4, 1992. No such decision exists. Instead, a Court of Appeals decision dated December 4, 1992 exists. The December 4, 1992 decision of the Court of Appeals is subject to discretionary review by the Supreme Court of Georgia by way of a Petition for Certiorari. The Petitioner failed to timely file a motion for reconsideration within the ten (10) days following the Court of Appeals' December 4, 1992 decision which is a pre-requisite to her filing a petition for certiorari with the Supreme Court of Georgia, the state court of last resort.

No order denying discretionary review by the Georgia Supreme Court concerning the December 4, 1992 decision of the Court of Appeals of Georgia exists. Therefore,

the Petitioner incorrectly argues she is seeking review of a judgment of a lower state court which has been denied discretionary review. The Petitioner failed to seek such discretionary review and does not have an order denying the same as required by United States Supreme Court Rule 13.1.

The Petitioner has failed to timely file her Petition for a Writ of Certiorari. The Supreme Court of Georgia decision from which the Petitioner is seeking further review is dated June 23, 1992. Plainly, this decision was rendered in excess of eight (8) months prior to her filing of the within Petition for a Writ of Certiorari.

WHEREFORE, Respondents pray this Honorable Court deny the within Petition for a Writ of Certiorari.

This 23rd day of April, 1993.

Respectfully submitted,

FAIN, MAJOR & WILEY, P.C.

BY: Donald M. Fain
DONALD M. FAIN

BY: Bruce A. Maxwell
BRUCE A. MAXWELL

Attorneys for Respondents

300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

Judgment of Trial Dated 11/06/90

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

ERMA L. ABAD and ERMA L. ABAD as Next Friend of VINCENT ABAD and ELIZABETH ABAD, Plaintiffs, v. KRAFT, INC. and CHARLES H. DIAL, Defendants.	)	CIVIL ACTION FILE NO.: **134012**

JUDGMENT

The case having come on for trial with notice to all parties, the Court having struck the demand for jury trial upon motion by Defendants, the Court having called the case and the Plaintiff having failed to put up evidence to prove the elements of its case, the Court after hearing and considering evidence offered by the Defendants, the Court hereby enters Judgment in favor of the Defendants with costs cast upon Plaintiffs.

This 6th day of November, 1990.

(s/NICK G. LAMBROS)
JUDGE, FULTON STATE COURT

Court of Appeals Decision Dated 09/03/91

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT, INC. Co-069.

COOPER, Judge.

This appeal arises from a judgment entered in favor of defendant when plaintiff failed to appear at the call of her case for trial.

The trial court's order, entered on November 6, 1990, recites the following: "The case having come on for trial with notice to all parties, the court having struck the demand for jury trial upon motion by defendants, the court having called the case and the plaintiff having failed to put up evidence to prove the elements of its case, the court after hearing and considering evidence offered by the defendants, the court hereby enters judgment in favor of the defendants . . . " Plaintiff's attorney admits that the case appeared on a trial calendar for the week of November 6 but contends that when the case had appeared on previous calendars, the trial judge had granted him thirty-six hours notice in which to appear because plaintiff resided in New York. Plaintiff alleges that on November 6, 1990 at 12:20 p.m., the trial court's calendar clerk called his office and left a message that the case would be called for trial at 1:30 p.m. Although the trial court's order states that plaintiff failed to put up evidence to prove the elements of her case, it is undisputed that neither plaintiff nor her attorney appeared for the trial of the case on November 6, 1990. Plaintiff argues that the non-appearance of plaintiff or her attorney for the trial amounted to a failure to prosecute the case; therefore, the trial court only had authority to dismiss her

case pursuant to O.C.G.A. § 9-11-41(b). We agree and reverse the trial court. "For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action. . . . [Such dismissal] does not operate as an adjudication upon the merits. . . . " O.C.G.A. § 9-11-41(b). In addition, Rule 14 of the Uniform Rules for the Superior Courts, which pursuant to the Uniform State Court Rules, is also applicable to the State Courts, provides: "On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action . . . upon the failure to properly respond to the call of the action for trial or other proceeding." Thus, both the Civil Practice Act and the Uniform Rules for Superior Courts provide an appropriate sanction which may be employed by the court when a plaintiff fails to appear at the call of his case for trial. In the case sub judice, the trial court went beyond the available sanction and entered a judgment in favor of the defendants. While we recognize the broad discretion a trial court has in regulating the business before it, *Ford Motor Credit Co. v. Williams*, 194 Ga. App. 405(1) (390 S.E.2d 640 (1990),we find no authority for the action taken by the trial court. Consequently, we conclude that the trial judge abused his discretion in entering a judgment against plaintiff when she failed to appear for trial.

Because we are reversing the trial court, we find it unnecessary to address plaintiff's remaining enumeration of error that the trial court erred in striking her demand for jury trial.

Judgment reversed. Birdsong, P.J., and Pope, J., concur.

Supreme Court of Georgia Decision Dated 06/23/92

In the Supreme Court of Georgia

Decided: June 23, 1992

S92G0189. *KRAFT, INC. v. ABAD*

CLARKE, Chief Justice.

Erma L. Abad, who lives in New York, was in an automobile accident with a vehicle driven by an employee of Kraft, Inc. She filed a personal injury action against Kraft in Fulton County. The case appeared on the trial calendar three times. Each of these calendars provided notice to plaintiff's counsel that the case could be called for trial on that day. The third time the case was on the calendar, the case was reached. The trial court's docket clerk had telephoned Abad's attorney an hour before the case was reached. Abad was in New York recovering from abdominal surgery. Her attorney could not be reached by phone. Neither Abad nor her attorney appeared at the call of the case. The trial court heard evidence put forward by defendant Kraft and entered judgment in its favor. The Court of Appeals reversed, saying that under O.C.G.A. § 9-11-41(b) (lack of prosecution) or Superior Court Rule 14 (failure to respond to calendar call) the trial court had only the authority to dismiss the action without prejudice. We granted certiorari and now reverse.

O.C.G.A. § 9-11-41(b) and Superior Court Rule 14 both contain permissive language. Under either provision the court *may* dismiss an action without prejudice if the plaintiff fails to appear at the call of the case. Neither provision, however, exhausts the options available to the

trial court under its authority to control its own docket and regulate the business of the court. *Scocca v. Wilt*, 243 Ga. 2 (252 S.E.2d 401) (1979). The rule and the statute simply allow the court to dismiss the action and restricts the dismissal to one without prejudice. It goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the court may go forward with the trial of the case as was done here. The judgment that is entered following such a trial is not a dismissal. It is a judgment like any other judgment that is subject to appeal, motion for new trial, or a motion to set aside under O.C.G.A. § 9-11-60.

Because we reverse on the above grounds, we do not address Kraft's remaining arguments.

Judgment reversed. All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

Supreme Court of Georgia Order Dated 06/23/92

Case No. S92G0189

SUPREME COURT OF GEORGIA

ATLANTA JUNE 23, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

KRAFT, INC., ET AL. V. ERMA L. ABAD

This case came before this court by writ of certiorari from the Court of Appeals; and, after argument had, it is considered and adjudged that the judgment of the Court of Appeals be **Reversed,**

and that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in this case.

All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

(ON GRANT: Weltner, Benham and Fletcher, JJ., dissent.)

134012
Court of Appeals Case No. A91A1084

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta DECEMBER 07, 1992
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Clerk.

Court of Appeals Decision Dated 12/04/92

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT. Co-069.

COOPER, Judge.

This court entered a judgment in the above-styled case at 201 Ga. App. 523 (411 S.E.2d 500) (1991) reversing the judgment of the trial court. The Georgia Supreme Court granted certiorari in *Kraft v. Abad*, 262 Ga. 336 (417 S.E.2d 317) (1992) and reversed our holding. Accordingly, our judgment is hereby vacated, and the judgment of the Supreme Court is made the judgment of this court with respect to appellant's first enumeration of error. In our first opinion, we declined to address appellant's second enumeration of error in which she argued that the trial court erred in striking her demand for a jury trial. We conclude that the authority to also strike appellant's demand for a jury trial was implicit in the trial court's authority to enter judgment in favor of the appellee/defendant upon appellant/plaintiff's failure to appear at trial. Cf. *Stewart v. Stewart*, 260 Ga. 812 (400 S.E.2d 622) (1991). Appellant's reliance on *Sewell v. Leifer*, 144 Ga. App. 36 (240 S.E.2d 584) (1977) is misplaced. In that case, the trial judge entered judgment in favor of the *plaintiff* upon the defendant's failure to appear, but there remained the issue of damages to be tried by the jury. Furthermore, any error in striking appellant's demand was harmless since appellant failed to present any evidence and judgment for appellee was demanded. See *Marler v. C&S Bank*, 239 Ga. 342 (236 S.E.2d 590) (1977).

Accordingly, we find no merit to this enumeration of error.)

Judgment affirmed. Birdsong, P.J., and Pope, J., concur.